United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7423

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

GWENDOLYN SHELTON, on her own behalf and on behalf of all others similarly situated,

Plaintiff-Appellant,

-against-

J. HENRY SMITH, et al.,

Defendants-Appellees.

Docket No. 76-7423

BRIEF FOR APPELLEES ON APPEAL FROM THE DECISION OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

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PRELIMINARY STATEMENT

This is an appeal from an order by Judge Kevin T. Duffy of the United States District Court for the Southern District of New York, abstaining pending completion of all state proceedings. This abstention was based on three grounds. First, if the petitions in the Family Court of the State of New York are successful, all of the appellant's parental rights will be terminated and the instant action will be moot for want of a plaintiff with proper standing. Second, plaintiff failed to demonstrate that the New York statute challenged empowers defendants to deny visitation without a hearing. Third, not only did the plaintiff fail to show that abstention would result in irreparable injury to herself, but the court below concluded that there was a greater possibility of emotional harm to the two children involved in mandating them to visit their natural mother on the eve of a possible permanent separation.

ISSUES PRESENTED

(1) Was the District Court correct in its sub silentio ruling by abstention that a three-judge court need not be convened to consider the claims in question?

(2) Was the District Court correct in its decision to abstain?

(3) Did the District Court properly deny appellant an injunction?

STATEMENT OF THE CASE

A. Proceedings To Date

Plaintiff-Appellant ("Appellant") appeals from an order entered in the Southern District of New York on August 12, 1976, in which the Honorable Kevin T. Duffy abstained from determining Appellant's claims, and denied Appellant's motion for preliminary injunctive relief pending convening a three-judge court. Based on its decision to abstain, the Court below sub silentio denied the motion to convene a three-judge court. The Court did not dismiss the action, but retained jurisdiction of the matter pending completion of all state court proceedings.

Appellant Gwendolyn Shelton initiated this action on July 7, 1976 on her own behalf, and on behalf of all other parents of children in foster care supervised by the defendants-appellees, New York City and New York State Departments of Social Services. Appellant is seeking in this proceeding to challenge the procedures followed by defendants-appellees in permitting parents to visit their children in voluntary, temporary foster care. Jurisdiction was invoked under 28 U.S.C. §1343(3) and (4) and under 28 U.S.C. § 1331.

Appellant requested declaratory and injunctive relief against enforcement of New York Social Services Law § 383.2 on the ground that this state law purportedly authorized the defendants to terminate parental visiting without prior notice or a hearing. Appellant alleged that this law violated associational and parental rights under the First, Ninth, and Fourteenth Amendments, and under the Social Security Act.

On July 12, 1976, Spence-Chapin Services To Families and Children ("Spence-Chapin") of which defendant-appellee Edwards is Executive Director, commenced proceedings in the Family Court of the State of New York, New York County, to declare Appellant's two children in foster care abandoned or permanently neglected (Matter of James Adams, Docket No. B2895/76; Matter of Alexander Jewett, Docket No. B-2895/76), so that they may be placed in adoption. These proceedings are now pending.

On July 14, 1976, Appellant moved the District Court for an order convening a three-judge court, permitting the action to be maintained as a class action, and enjoining the defendants-appellees from preventing her from visiting her children, without prior notice and a prior hearing, pending the convening of a three-judge court. The Court below abstained pending completion of all state proceedings.

B. Facts

Appellant, Gwendolyn Shelton, is the natural mother of four children.* Two of these children, James (age three) and Alexander (age six) are in foster homes supervised by Spence-Chapin on behalf of the New York City Department of Social Services. Spence-Chapin is a private, nonsectarian child care agency, and is an "authorized agency" as defined by Section 371(10)(a) of the Social Services Law of the State of New York.

Alexander Jewett is the Appellant's first child. His alleged natural father is Tommy Wilson, who has had no contact with Spence-Chapin, and apparently never has expressed any interest in or contributed to Alexander's support. Robin Adams ("Robbie"), born March 25, 1971, the Appellant's second child, is not involved in the instant proceeding. James Shelton is the Appellant's third child, and was born on June 17, 1973. His natural father apparently is Roy Shelton, whom the Appellant married on March 18, 1974.

The Appellant and her children first came to Spence-Chapin's attention in March 1973, on a referral

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* This statement of the background of this placement is derived from the July 15, 1976 affidavit of Mrs. Loyce W. Bynum, Associate Executive Director, which is item 6 of the Record on Appeal. Appellant offered almost no evidence in support of her applications, and hence this statement stands for the most part, without dispute in the Record.

from a social worker at the Bronx Lebanon Hospital, who had had several contacts with the Appellant, who then was using the name Gwendolyn Adams. Both Alexander and Robbie had received medical care at the hospital for a period of time, and the Appellant was then requesting an evaluation of Alex, whom she felt was somewhat "retarded" for a three year old, stubborn, and whom she wanted placed in a "special school" such as Willowbrook. She also described Alex to the hospital caseworker as a "very bad boy" and one whom she "hates". The Appellant and her children were referred to Spence-Chapin's Intensive Family Service Unit, because of the hospital's concern for the quality of care Alex was receiving from his mother, possible emotional and physical neglect, and because of the Appellant's statement that she preferred institutionalizing Alexander.

During Spence-Chapin's first contacts with the Appellant in March 1973, its caseworker convinced Mrs. Adams at least to wait for results from the hospital examination before deciding to institutionalize Alexander. Even after observations at the hospital indicated that Alexander was functioning on at least an average level of intelligence, and had a very good potential for learning, Mrs. Adams was not convinced that Alex was not slow and persisted in her desire to have him placed in an institution.

The Chief Psychologist and Director of the Children's Mental Health Services at the hospital further indicated that there seemed to be little likelihood that Alexander had received much positive supportive encouragement from Mrs. Adams, and that that in great part was the probable cause of his language deficit.

In addition to the Appellant's repeated desire to have Alexander institutionalized, Spence-Chapin's caseworker also learned from Mrs. Adams that she frequently left her two children alone to go shopping or visit friends. It also became clear to the caseworker that Mrs. Adams was resentful of Alexander because she had been abandoned by his alleged father, Tommy Wilson. With this background, the caseworker suggested foster care to the Appellant as an alternative to Alex' institutionalization. Mrs. Adams consented to foster care on the ground that "the foster family be on welfare because they won't be able to buy Alex new clothes and he will in this way learn to work for what he gets." Alex was admitted to foster care on April 16, 1973, and soon was making excellent progress in his foster home.

Between April and June 17, 1973, when James was born, Spence-Chapin's casework by its Intensive Family Service Unit continued with the Appellant, focused on

arranging suitable in-home care for her son Robbie while Mrs. Adams gave birth to James.

Following James' birth, further casework efforts were made to help Mrs. Adams find work. Mrs. Adams' husband was said by her to have provided sporadic and meager support, with his major interest in James, rather than Robbie and Mrs. Adams. The Appellant called Spence-Chapin and stated that if it did not take James into foster care, she would stop feeding him. In light of her displaced hostility and its possible subsequent consequences for James, and her past neglect of Alexander, James was admitted voluntarily to foster case on August 17, 1973.

On that day, Mrs. Adams came to Spence-Chapin with her boyfriend, Roy Shelton (whom she subsequently married), who acknowledged paternity of James (with the Appellant's agreement). At this point, it became apparent that Roy Shelton was probably the "phantom" husband Mrs. Adams had been describing. [Both supposedly shared the same first name; were born in Africa; and attended Farmingdale College. While Mrs. Adams had originally said she was putting James into care to punish her husband, Mr. Shelton, at the time of placement, remarked that Mrs. Adams was putting James into care to punish <u>him</u> for not having done his part for the whole family.] Mr. Shelton

was very upset with the Appellant's plan for James in foster care and stressed that he wanted to work for the return of both children as promptly as possible. He indicated that he felt he could get both Mrs. Adams and himself "together" with regard to an apartment and their finances.

Caseworkers saw that the Appellant was using her children as vehicles for her own gratification. She put James into foster care to punish her husband and/or Mr. Shelton. Since Mr. Shelton wanted the boys back, she now demanded their return to maintain that relationship. She was totally without understanding of her own problems and difficulties, and was highly resistive of any counseling in that regard. On the other hand, Mr. Shelton came across as a bright, articulate man, very interested in fathering and eventually adopting the children, and aware of the Appellant's need for a great deal of emotional and financial support. It was Mr. Shelton who would change James' diapers, wipe Alexander's running nose and otherwise care for the children. Mr. Shelton also tried to encourage the Appellant to be more affectionate, protective and sensitive to James and Alexander, without success.

Mrs. Shelton, on the hand, in November 1973, simply demanded the return of her children and refused to

discuss what her plans, if any, were for their care. When she finally was persuaded to come to Spence-Chapin on November 26, 1973, to discuss her plans and the children's return, she broke the appointment. In a phone conversation afterwards, she told Spence-Chapin's caseworker that she was moving and would not be able to be reached. The caseworker requested Mrs. Shelton to give her the new address and telephone number when she moved. In February 1974, Mrs. Shelton called Spence-Chapin and stated she was moving to Georgia and wanted to see the worker. An appointment was made for March 4.

Mrs. Shelton came to Spence-Chapin on that date and stated that she was not moving to Georgia. A visit was set up for the following week, during which the Appellant was almost totally rejecting of Alexander. She did not relate to him at all, on any kind of emotional level. Indeed, as soon as the caseworker came in with James and Alexander, the Appellant walked out without acknowledging the children's presence, saying Robbie had to go to the bathroom. In the following two months, visits went better, although Mrs. Shelton continued to compare Alex and James unfavorably with Robbie. Primarily on the basis of the support and resources of Mr. Shelton, it was agreed that Alexander would be returned for a trial discharge, as he was on June 7, 1974.

Once Alexander was returned, for over a year, Mrs. Shelton could not be persuaded to visit James. Indeed, the only request for a visit with James came on June 24, 1975, after Alexander had been returned to foster care by Mrs. Shelton, who wanted to swap him for James as a playmate for Robbie. This visit could not be set up at the time requested because James then had the measles. Mrs. Shelton remained out of contact with Spence-Chapin thereafter until November 1975 (as detailed hereafter), and when she finally did reappear, Spence-Chapin explained that they were planning to go to court to free James for adoption on the basis of abandonment. It was at this point that she began to express interest in again visiting James. In view of her past conduct and its effect on the children, and in view of the likelihood that James would be freed on the basis of abandonment, it was deemed contrary to James' best interests for him to have any further contact with Mrs. Shelton.

The year that Alexander was with the Appellant and her husband was a very negative one for him. From the beginning, he was a source of friction between the Appellant and her husband, and was rejected by Mrs. Shelton, who constantly was disparaging him in comparison to his younger brother Robbie. During a home visit by Spence-

Chapin's caseworker on July 2, 1974, Mrs. Shelton expressed her displeasure with Alex's unwillingness to fight back, while Mr. Shelton felt that Alex was too "sassy". The Sheltons fought in front of the caseworker, with Mrs. Shelton complaining that Mr. Shelton did not take the boys out as often as a father should. By the next home visit on August 15, Mr. Shelton indicated that he was taking the boys out more, but that now his wife was complaining that he was spending too much time with them and not with her. Mrs. Shelton at that time was disinterested in discussing a plan for James' return, saying it was up to Mr. Shelton, as he is the "breadwinner". Mr. Shelton promised to be in touch with Spence-Chapin later in the summer about James.

In December 1974, Mrs. Shelton sought assistance from Spence-Chapin's caseworker, whom she wanted to help her in getting Medicaid coverage for Alexander. During these contacts, the Appellant let the caseworker know that she considered Alexander a burden, as opposed to Robbie. Mrs. Shelton adamantly did not want to discuss plans for returning James, and seemed to feel that Spence-Chapin was trying to force her to take James back also. As Mr. Shelton never had legally adopted James or Alexander, plans could not be made with him alone. However, Mr. Shelton did not seem to be pushing for adopting James and Alexander

because he and Mrs. Shelton seemed to argue about them often. Throughout this period, Spence-Chapin's caseworkers remained in contact by correspondence, telephone and, whenever possible, home visits to the Sheltons.

At one interview, on April 19, 1975, Spence-Chapin's caseworker, as part of her efforts to encourage Mrs. Shelton to visit, or at least discuss planning for James, indicated that a judge might feel that her lack of visiting could justify abandonment proceedings. Mrs. Shelton indicated that she would fight such proceedings, but still was unwilling to discuss or visit James.

In March 1975, Mrs. Shelton called Spence-Chapin "in a highly agitated state". She was expecting her fourth child, Beverly, any day, and wanted to return Alexander to foster care (but not place Robbie). Mr. Shelton later called and said he would care for both boys while his wife was in the hospital, and that his wife really didn't want to readmit Alex. In April and May 1975, Spence-Chapin's caseworker was able to make weekly home visits to the Sheltons to try to help Mrs. Shelton plan for James' future and also to assist her in a more positive relationship towards Alexander, who clearly was the least favorite child in the home. Although she seemed to see all of her children as burdens interfering with her satisfying her own needs, Mrs. Shelton particularly felt this

way about Alex. She would frequently compare Alex unfavorably with Robbie and fostered an unhealthy competitive relationship between them, causing Alexander to feel angry towards his half-brother.

On May 16, 1975, Mrs. Shelton came to Spence-Chapin to discuss the problems she was having with Alexander, who was then 5 1/2 years old. Mrs. Shelton repeated her recurrent themes that Alexander is a slow child and is a "sissy", indicating that Robbie knew how to spell twice as many words as Alex, and usually wound up protecting him since Alex wouldn't fight other kids. Mrs. Shelton made it clear that she was not going to have Robbie risk himself for a "sissy" like Alexander. Mrs. Shelton also stated that Alex was creating problems between herself and her husband, who felt that she was too hard on Alexander and lately "seems to care more for Alexander than for me". Mrs. Shelton indicated that her husband did not know of her plan to place Alexander, stating: "its none of his business since I can do whatever I want with Alexander - he's mine, not my husband's child." Mrs. Shelton added that she no longer spoke with her husband, since that only led to arguments, and further that she did not want him to come to Spence-Chapin to visit with the children or talk with our caseworker.

Mrs. Shelton's prime concern in putting Alex back into foster care, on May 16, 1975, was that she receive a promise that she could "replace Alexander with James". She felt that since Robbie was now accustomed to having a playmate, she would like to "try out" James. After Spence-Chapin's caseworker, and his supervisor, reiterated that each child should be thought of and planned for separately, Mrs. Shelton finally ageeed that she would bring Alexander back into foster care (to his previous foster family, who were anxious to have him back) without any simultaneous agreement that James would be returned "in trade".

Alex was scheduled to go back into foster care on May 24. On that date, Mr. Shelton called to say that his wife had gone for a job interview and he had to watch the baby, Beverly, so Alexander could not return to foster care that day. He added that Alexander already had been told he was leaving. The next day, Spence-Chapin's caseworker called the Appellant and explained to her what should have been obvious to her had she cared, that since Alexander now knew he was going back into foster care, he must be very upset and confused and that the sooner the transfer could be accomplished, the better it would be for him. Mrs. Shelton said she was unable to go to the agency any more. She also wanted to get Alexander's

hair cut before he left, and could not do this before June 3. The caseworker agreed to come to Mrs. Shelton's home on that date to pick up Alexander.

On June 3, the caseworker called on the Shelton home. She found roaches in the baby's crib as well as throughout the kitchen and living room. The baby (then three months old) had a pillow in her crib and was being fed with pablum in a bottle with an enlarged nipple. When Spence-Chapin's caseworker pointed out the hazards of a pillow in a crib and of cereal being fed from a bottle, Mrs. Shelton became withdrawn at the suggestions and told the caseworker that she knew what she was doing as she had raised several children. When Alex left, Mrs. Shelton simply called out goodbye and, as the caseworker noted "was on her way back to Robbie in the living room before Alexander was even out the door." Mrs. Shelton made no inquiries concerning Alexander from that day until November.

Later that month, on June 24, Mrs. Shelton called Spence-Chapin wanting to visit with James. He had the measles and a visit was unable to be set up at that time. On June 27, 1975, the Natural Parent Review Board met to consider Mrs. Shelton's request for James' return and decided that, because of Mrs. Shelton's lack of planning and contact with him, a petition should be

sought to terminate her rights and place him in adoption, and that further visiting should not be allowed since they would not be in his best interests. Between July 9 and 12, the caseworker repeatedly attempted to call Mrs. Shelton, without any success. On July 25 and August 1, the caseworker talked with a woman who answered Mrs. Shelton's phone and who indicated that Mrs. Shelton was out until 5:00 p.m. On neither occasion did Mrs. Shelton return the call as requested. A letter was sent to Mrs. Shelton on August 18, which also elicited no response.

On September 29, a new caseworker was assigned to Mrs. Shelton, as the former worker had left Spence-Chapin. Mrs. Shelton called, asking who the new worker was, but refused to leave her telephone number, saying she would call again. When she did not, on October 7, a certified letter was sent to her introducing the new worker and asking the plaintiff to call for an appointment to discuss planning for Alexander and James. [The receipt for this letter indicates that it was received by Mrs. Shelton on October 9.]

Over a month later, on November 11, Mrs. Shelton called requesting an appointment, which was set up for November 17. At that time, Mrs. Shelton claimed to have made numerous attempts to call Spence-Chapin but that nobody ever contacted her. When the caseworker explained the plan

with regard to James, Mrs. Shelton replied "I know my rights. As long as I want to visit I can. I want to take James home for Christmas." The new caseworker felt, since Mrs. Shelton had some plans, and approval to terminate parental rights had not yet been received from the Bureau of Child Welfare, that she had to offer a mother visit, which she did. Mrs. Shelton acknowledged that James might not remember her "right away", but that if he did get upset or cry, it was because he hadn't been "raised properly". Mrs. Shelton asked how Alex was doing, and again brought up her usual complaints about him. When the caseworker asked whether Mrs. Shelton had ever thought about surrendering Alex, Mrs. Shelton replied that she had, but then wouldn't be able to see him when she wanted to. She said she thought she might like to see Alexander "some time" in December, because "Robbie asks about him sometimes, and I forgot to give him some of his toys when he left."

On November 26, a conference was held to determine whether Mrs. Shelton's visiting James at this time would be in his best interests. In view of her past behavior, unrealistic expectations of children and attitudes towards them, it was decided to proceed with the plan to petition the Bureau of Child Welfare for termination of rights, to inform Mrs. Shelton of this, and that visitation

would not be allowed. Shortly thereafter, a meeting of the Natural Parent Review Board considered the future plans for Alexander, and concluded that his best interests also dictated asking the Bureau of Child Welfare for permission to proceed to petition to terminate parental rights with respect to him as well, and that visitation by Mrs. Shelton with him also would be harmful.

Spence-Chapin's position was explained to Mrs. Shelton on December 8. When it became clear to her that she would not be able to see James before his custody was settled in court, she indicated "then I want to see Alexander and plan to take him home." It was explained that Spence-Chapin's position was the same as to Alex. Mrs. Shelton stated that if Spence-Chapin wanted to take her to court, that was their business. At the end of the interview, Mrs. Shelton asked, "If I win, then I want to be able to see them when I want to, okay?"

Thereafter, in April 1976, an attorney contacted Spence-Chapin on behalf of Mrs. Shelton, requesting only the possibility of visitation with respect to Alexander. During the following weeks, the possibility of giving Mrs. Shelton an additional chance to work towards Alexander's return was discussed with her attorney, and within Spence-Chapin, on the basis of whether such efforts would be in

the child's best interests. Copies of Spence-Chapin's files with respect to Alexander and Mrs. Shelton were made available to her attorney, Louise Gans, of the Community Action for Legal Services, and her associate Philip C. Segal (who is of counsel to the present appeal). After reviewing the above information, and consulting with psychologists about the possible effect on Alexander, it was concluded that such further efforts would be contrary to his best interests. Mrs. Shelton's attorneys were so advised.

In summary, Mrs. Shelton was warned of the consequences of her failure to visit and plan for her children, and was made fully aware of the reasons for the proposed termination of visitation and parental rights. Visitation rights were halted, in Alexander's case, because of the clearly negative effect that Mrs. Shelton had on him and the dim prospects for any establishment of a parental relationship. With respect to James, the visit requested by Mrs. Shelton also was denied in the child's best interest. The Appellant's own conduct, and James' own best interests, warranted Spence-Chapin's decision to bring the Family Court proceeding to free him for adoption by reason of abandonment.

POINT I

THE DISTRICT COURT WAS CORRECT IN ITS SUB SILENTIO RULING BY ABSTENTION THAT A THREE-JUDGE COURT NEED NOT BE CONVENED TO CONSIDER THE CLAIMS IN QUESTION

In abstaining, the Court below held that a single judge properly could do so even though the case otherwise would be a proper one for the convening of a three-judge court. Appellant's argument that this ruling was erroneous is without support.

Appellant first relies on Steffel v. Thompson, 415 U.S. 452, 457 n.7 (1974). In that case, a state criminal prosecution had been threatened, but not commenced. Invoking the Civil Rights Act of 1871, 42 U.S.C. § 1983, and its jurisdictional implementation, 28 U.S.C. § 1343, the petitioner challenged the Georgia statute under which prosecution was threatened, claiming that it violated petitioner's First and Fourteenth Amendment rights, and sought an injunction restraining respondents from enforcing the statute. The District Court dismissed the action on the grounds that no actual controversy existed, and was affirmed in its denial of declaratory relief. The Supreme Court, on finding a real controversy even though prosecution only had been threatened, asserted, in dictum, that "[s]ince the complaint had originally

sought to enjoin enforcement of the state statute on grounds of unconstitutionality, a three-judge district court should have been convened." 415 U.S. 452, 457. This dictum is not in any way directed to the question of abstention, since, in fact, the District Court had not abstained, but rather had dismissed the action for want of a real controversy. Here, there has been no challenge to the constitutionality of the permanent neglect and abandonment actions, which already are actually pending. The District Court, as yet, has only abstained. It has not dismissed the action.

Plaintiff's reliance on Abele v. Markle, 452 F.2d 1121 (2d Cir. 1971) similarly is mistaken. In that case, this court stated that a single judge requested to convene a three-judge court is limited

> ". . . to determining (1) whether the constitutional question is substantial; (2) whether the complaint at least formally alleges a basis for equitable relief; and (3) whether the case comes within the requirement of the three-judge statute." 452 F.2d 1121, 1125 (2d Cir. 1971).

Thus, it is firmly within the province of the single District Court judge to whom an action originally is presented to refuse to convene a three-judge court (and even dismiss the action) if he concludes that the general requisites of federal jurisdiction are not present. See, e.g., Port of New York Authority v. United States, 451 F.2d 783 (2d Cir. 1971);

Eastern States Petroleum Corporation v. Rogers, 280 F.2d 611 (D.C. Cir. 1960). In the present action, whether Mrs. Shelton has standing clearly is a jurisdictional matter, and this threshold question properly can be determined by a single judge prior to the convening of a three-judge court to hear the merits of the controversy.

Since the constitutionality of laws may be challenged only by those litigants who suffer an actual or substantial injury from their enforcement, as distinguished from a remote, general, or hypothetical possibility of harm, the initial determination of whether the plaintiff in the instant action is a proper one, and thus has standing, is a proper question for a single judge. United Public Workers v. Mitchell, 330 U.S. 75, 89-90 (1947).

Moreover, in order for a three judge district court to be mandated, the constitutional attack must not be insubstantial. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962). In the instant case, in contrast to the situation in New York State Waterways Assn. Inc. v. Diamond, 469 F.2d 419 (2d Cir. 1972), relied on at page 8 of Appellant's memorandum, Appellant did not allege or demonstrate either (a) a basis for her allegation that the challenged statute is unconstitutionally vague as to the requirements of a hearing or (b) that a constitutionally

protected parental right of visitation even exists. Indeed, the statute here challenged* has no bearing on visitation and hearing requirements, confirming only that the authorized agency (here Spence-Chapin as agent of the New York City Commissioner of Social Services) - and not the natural parent, has the rights and obligations attendant to a child's custody while that child is in foster care. Appellant's protracted argument about the importance of a family (which Mrs. Shelton has not provided) and the visitation aspects of custody (which she does not have) thus are totally inapposite. It is clear that Mrs. Shelton possesses no right of visitation which would require constitutional protection.

Appellant's further reliance upon McRedmond v. Wilson, 533 F.2d 757, 764 (2d Cir. 1976), is even more surprising, since in that case this court affirmed the district court's abstention and sub silentio ruling that a three-judge court need not convene to consider the constitutional claims in question. This court agreed with the district court's ruling that the plaintiff's reliance on the Eighth Amendment,

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* New York Social Services Law §383(2) provides: "The custody of a child boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded."

the Equal Protection Clause, and the rights of association and travel, to challenge PINS placement, did not rise to a level of constitutional substantiality as to warrant the convening of a three-judge court. Similarly, Mrs. Shelton's reliance here on a "constitutionally protected parental right" does not rise to the level of constitutional substantiality requisite to warrant the convening of a three-judge court. Any parental right to visitation is subject to the best interests of the child. A rational balancing of these rights is readily apparent, and was made in the instant situation. Moreover, as legal custodians, the Commissioner of Social Services and Spence-Chapin, and not Mrs. Shelton, are empowered to make this determination of what is in the child's best interests.

POINT II

THE DISTRICT COURT'S DECISION TO ABSTAIN WAS PROPER

The district court stated three bases for its abstention: First, if the Family Court action against Mrs. Shelton is successful in terminating all parental rights, the instant action will be moot for want of a plaintiff with proper standing. Second, Mrs. Shelton failed in any way to demonstrate that the challenged New York statute empowers

defendants to deny visitation without a hearing. Third, Mrs. Shelton failed to show that abstention would result in irreparable injury to herself. Each of these bases for abstention is proper, and individually would support the decision reached.

As Appellant points out, it is a litigant's right to enjoy a federal tribunal and this right may not be defeated by relegating the matter to the state court or by requiring a litigant to exhaust state remedies. McNeese v. Board of Education for Com. Unit School District 187, 373 U.S. 668 (1963); Zwickler v. Koota, 389 U.S. 241 (1967). Nevertheless, in this right to a federal forum, courts have carved a firm niche - that is, the doctrine of abstention, born in Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). There, the court held that where the ultimate resolution of a federal constitutional issue is controlled by the interpretation of a vague, ambiguous, unclear, or complex state statute, which interpretation might avoid or modify the necessity of a constitutional adjudication, the federal court should defer to the state court's interpretation of its own statute. McRedmond v. Wilson, 533 F.2d 757 (2d Cir. 1976); see also in accord Kusper v. Pontikes, 414 U.S. 51, 54 (1973); Lake Carriers Assn. v. MacMullen, 406 U.S. 498 (1972); Propper v. Clark, 337 U.S. 472, 492 (1949); Harman v. Forssenius,

380 U.S. 528 (1965). In such cases, courts regularly have determined that the final depository for interpretation of state law is the state's highest court. Furthermore, by availing itself of the state's highest court, the federal court is spared a duplication of effort and expense. Moreover, if the determination of the state court should fail to avoid the federal constitutional question, the stay of the federal suit can be ended and the litigant may return to the federal forum which initially was selected.

Specifically, abstention may be invoked, in the court's discretion, if three requisites are met: the state statute must be vague, ambigucus or unclear, Harman v. Forssenius, supra, 380 U.S. at 534; the resolution of the federal issue must depend upon the interpretation to be given to the state law, Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); and the state law must be susceptible of an interpretation that would avoid or modify the federal constitutional issue. McRedmond v. Wilson, supra, 533 F.2d at 761.

The instant case meets these three requirements. First, the state statute, New York Social Services Law § 383(2) is, in a sense, vague, ambiguous and unclear in its failure to direct itself to visitation. It is so because it has nothing to do with that issue. It merely places custody of a child in care in the authorized agency.

Second, resolution of whether an authorized agency constitutionally can terminate visitation without a hearing must depend upon the interpretation to be given to New York Social Services Law § 383(2). Appellant argues that this statute clearly permits an authorized agency to terminate visitation without a prior hearing. However, Appellant fails to cite any authority supporting this interpretation. (Indeed, a prompt, almost immediate, hearing is, in fact, provided when requested, by the City and State, and in the Family Court.)

Third, since it is silent on the point, the statute clearly is susceptible of an interpretation that would avoid or modify the federal constitutional issue. As Judge Duffy accurately asserted

> ". . . although the statutes are challenged on vagueness grounds, plaintiff has cited no state court decision holding that the challenged sections empowers defendants to deny visitation rights without a hearing. Since the challenged section is totally silent on the question, the state court may well conclude as a matter of statutory construction that a pre-termination hearing is required. It is also possible that the court may find that while the statute does not require a hearing, other provisions of state law do mandate a hearing."

The three requisites for abstention thus are met in the instant situation. It is respectfully submitted that the district court did not err in its exercise of discretion to abstain, and that that decision should be affirmed.

Appellant's reference to cases stating that the delay inherent in abstention would abrogate the relief sought in federal court, is also inapposite. The instant situation differs from that in Smith v. Cherry, 489 F.2d 1098 (7th Cir. 1973), cert. denied, 417 U.S. 910 (1974), since in that case, the statute in question was clear on its face, having been construed literally by the highest court of the state. No reason for an abstention reference existed. In the instant situation, no such interpretation exists.

Contrary to the situation in Wisconsin v. Constantineau, 400 U.S. 433 (1971), the instant statute does not clearly, without any ambiguity, permit or encourage the challenged action without notice and hearing. Rather, it provides for custody, a special relationship under the law, which relationship is guided and controlled by the parameters of the best interests of the child.

Finally, Appellant claims that she is unduly suffering from the inevitable delay which results from abstention, during which time she is deprived of any opportunity to see her children. However, Appellant ignores her own past prolonged absences and abandonment and neglects to point out that on the two occasions the state court proceedings already have come before a judge in Family Court, on August 24, 1976

and October 5, 1976 wherein she had the clear opportunity to request visitation, (and that court has the power to order it if warranted) no request even was made. To maintain at this juncture that she is suffering any hardship from lack of visitation surely is ironic.

Appellant's further contention that she has no plain and adequate state remedy also is false. Such remedies exist, and Appellant merely has refused to avail herself of the administrative and Family Court procedures to effectuate the granting of visitation.

POINT III

THE DISTRICT COURT PROPERLY DENIED APPELLANT AN INJUNCTION

Contrary to Appellant's assertions in her brief, she does not even approach meeting the standards for granting preliminary relief set forth in Sonesta International Hotels Corporation v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973). She has (1) failed to show probable success on the merits of this litigation and possible irreparable injury, or (2) failed to raise sufficiently serious questions going to the merits to make them a fair ground for litigation and failed to indicate a balance of hardships tipping decidedly in her favor. Rather, even

during the hypothetical denial of her alleged right to visit James and Alexander, Mrs. Shelton could have obtained a hearing on visitation and on whether or not such visits were in the children's best interests, either from City or State administrative agencies, or in the Family Court. Despite representation by counsel throughout most of that period, Mrs. Shelton resorted to none of these alternatives. In fact, on August 24, 1976, Mrs. Shelton did not even appear for the Intake hearing in the Family Court proceedings, which hearing was adjourned by that court because of her wilful absence. On October 5, 1976, although appearing at the Intake hearing, no request for visitation was made. Such conduct belies her stated position of irreparable injury. Moreover, Appellant's argument that the deprivation to the parent of any contact with her children causes emotional turmoil and pain to both parent and child also is shocking in view of the facts, as stated supra, which reveal her past indifferent, almost hostile, attitude, and the suffering her presence has caused. It is respectfully submitted that the best interests of these children must prevail, especially where they are uncontradicted by any legal or moral basis for the relief requested contrary to those best interests.

CONCLUSION

For the above reasons, the decision of the Court below should be Affirmed in all respects.

Respectfully submitted,

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